RECORD AND BRIEFS

FILED
SEP - 7 2017
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 16-111

IN THE
Supreme Court of the United States

MASTERPIECE CAKESHOP, LTD.; AND JACK C. PHILLIPS,

Petitioners,

v.

COLORADO CIVIL RIGHTS COMMISSION; CHARLIE CRAIG; AND DAVID MULLINS,

Respondents.

On Writ of Certiorari to the Colorado Court of Appeals

BRIEF OF AMICI CURIAE PROFESSORS CHRISTOPHER R. GREEN AND DAVID R. UPHAM SUPPORTING PETITIONERS

DAVID R. UPHAM
Counsel of Record
UNIVERSITY OF DALLAS
1845 E. Northgate Drive
Irving, TX 75062-4736
(972) 721-5186
davidrupham@yahoo.com

CHRISTOPHER R. GREEN
UNIVERSITY OF MISSISSIPPI
SCHOOL OF LAW
481 Chucky Mullins Drive
University, MS 38677
(662) 915-6837
crgreen@olemiss.edu

Counsel for Amici Curiae

QUESTION PRESENTED

This brief addresses the question whether the Fourteenth Amendment's requirement of equal citizenship allows states to exclude bakers like Masterpiece from the marketplace.

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTEREST OF AMICI CURIAE 1

SUMMARY OF ARGUMENT 3

ARGUMENT 5

I. The Fourteenth Amendment secures equal civil rights and thus bans second-class citizenship 5

II. The Fourteenth Amendment's ban on second-class-citizenship includes creedal and viewpoint discrimination 9

A. Original Meaning 10

B. Religious-Liberty Background 13

C. Original Purposes 17

D. This Court's Statements 18

III. The exclusion of traditionalists from wedding-related professions is strongly akin to the anti-Catholic Test Acts 20

IV. Mere privately-inflicted dignitary harm in a market with readily-available substitute goods does not justify restrictions on others' civil rights. 26

CONCLUSION 36

TABLE OF AUTHORITIES

Page

CASES

Allgeyer v. Louisiana,
165 U.S. 578 (1897) 35

Allnutt v. Inglis,
104 Eng. Rep. 206 (K.B. 1810) 29, 33-35

American Sugar Refining Co. v. Louisiana,
179 U.S. 89 (1900) 19

Bartemeyer v. Iowa,
85 U.S. 129 (1874) 26

Bell v. Maryland,
378 U.S. 226 (1964) 31-32

Cantwell v. Connecticut,
310 U.S. 296 (1940) 4

Corfield v. Coryell,
6 F.Cas. 546 (E.D. Pa. 1825) 2, 7-8

Craig v. Masterpiece Cakeshop,
370 P.3d 272 (Colo. App. 2015) 25

Cummings v. Missouri,
71 U.S. 277 (1867) 22

Edwards v. California,
314 U.S. 160 (1941) 19

Elane Photography, LLC v. Willock,
309 P.3d 53 (N.M. 2013) 25

Employment Division v. Smith,
494 U.S. 872 (1990) 19

TABLE OF AUTHORITIES—Continued

Page

Everson v. Board of Education,
330 U.S. 1 (1947) 14-15

Ex Parte Garland,
71 U.S. 333 (1867) 22

Hawthorn v. Hammond,
174 Eng. Rep. 866 (1844) 32-33

Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston,
515 U.S. 557, 571 (1995) 32

In re Klein, Nos. 44-14 & 45-14 (Ore. Bureau of Labor and Industries, July 2, 2015), available at goo.gl/WO8Jvh 23, 25

Lee v. Weisman,
505 U.S. 577 (1992) 15

Live-Stock Dealers' & Butchers' Association v. Crescent City Live-Stock Landing & Slaughter-House Co.,
15 F.Cas. 649 (D.La. 1870) 13

McCreary County v. ACLU,
545 U.S. 844 (2005) 15

McDonald v. Chicago,
561 U.S. 742 (2010) 2, 4, 20, 33

TABLE OF AUTHORITIES—Continued

Page

Munn v. Illinois,
94 U.S. 113 (1877) 29, 32, 34-36

Obergefell v. Hodges,
135 S.Ct. 2584 (2015) 3, 25

Plessy v. Ferguson,
163 U.S. 537 (1896) 19

Reynolds v. United States,
98 U.S. 145 (1879) 15

Speiser v. Randall,
357 U.S. 513 (1958) 22

State v. Arlene's Flowers, Inc.,
389 P.3d 543 (Wash. 2017) 25

Town of Greece v. Galloway,
134 S.Ct. 1811 (2014) 19

Trinity Lutheran Church of Columbia, Inc. v. Comer,
137 S.Ct. 2012 (2017) 19

Young v. Harrison,
6 Ga. 130 (1849) 29

TABLE OF AUTHORITIES—Continued

Page

STATUTES

Test Act, 25 Car. II, c. 2, 5 Statutes of the Realm 782 (1673) 4, 20-24

An Act to Protect All Persons in the United States in Their Civil Rights, and Furnish the Means of Their Vindication, 14 Stat. 27 (April 9, 1866) 5-6, 8-11

An Act to Protect All Citizens in Their Civil and Legal Rights, 18 Stat. 335 (March 1, 1875) 5, 12, 26, 28, 30-31, 34

LEGISLATIVE DEBATES

Annals of Congress 15

Congressional Globe 6, 8-9, 11, 21-22, 28, 30-32

Congressional Record 12

Report of the Debates and Proceedings of the Convention for the Revision of the Constitution of Indiana (1851) 9

NEWSPAPERS

Chicago Tribune, Feb. 12, 1867 10

TABLE OF AUTHORITIES—Continued

Page

Chicago Tribune, Dec. 12, 1868 18

Cincinnati Commercial, Speeches of the Campaign of 1866 ..... 6-7, 11-12

Nashville Daily Union and American, Nov. 7, 1855 13

Raleigh, N.C., Tri-Weekly Standard, May 3, 1866 6

The Cecil Whig, May 26, 1866 17-18

The Weekly Caucasian, June 20, 1866..... 21

USA Today, June 26, 2017 25-26

ARTICLES

Avins, The Civil Rights Act of 1875: Some Reflected Light on the Fourteenth Amendment and Public Accommodations, 66 Colum. L. Rev. 873 (1966) 33-34

Epstein, Public Accommodations Under the Civil Rights Act of 1964: Why Freedom of Association Counts as a Human Right, 66 Stan. L. Rev. 1241 (2014) 30

TABLE OF AUTHORITIES—Continued

	Page
Epstein, The History of Public Utility Rate Regulation in the United States Supreme Court: Of Reasonable and Nondiscriminatory Rates, 38 J. Sup. Ct. Hist. 345 (2013)	30
Green, Duly Convicted: The Thirteenth Amendment as Procedural Due Process, 15 Geo. J. L. & Pub. Pol'y 73 (2017)	2
Green, Incorporation, Total Incorporation, and Nothing But Incorporation?, 24 Wm. & Mary Bill Rts. J. 93 (2015)	2
Green, The Original Sense of the (Equal) Protection Clause: Pre-Enactment History, 19 Geo. Mason U. Civ. Rts. L.J. 1 (2008)	2
Green, The Original Sense of the (Equal) Protection Clause: Subsequent Interpretation and Application, 19 Geo. Mason U. Civ. Rts. L.J. 219 (2009)	2
Green, Twelve Problems with Substantive Due Process, Geo. J. L. & Pub. Pol'y (forthcoming 2018)	2

TABLE OF AUTHORITIES—Continued

Page

Harrison, Reconstructing the Privileges or Immunities Clause, 101 Yale L.J. 1385 (1992) 5

Koppelman, Gay Rights, Religious Accommodations, and the Purposes of Antidiscrimination Law, 88 S. Cal. L. Rev. 619 (2015) 27-28

McConnell, Originalism and the Desegregation Decisions, 81 Va. L. Rev. 947 (1995).... 28

Singer, No Right to Exclude: Public Accommodations and Private Property, 90 Nw. U. L. Rev. 1283 (1996) 33-34

Upham, Corfield v. Coryell and the Privileges and Immunities of American Citizenship, 83 Tex. L. Rev. 1483 (2005) 2, 7

Upham, Interracial Marriage and the Original Understanding of the Privileges or Immunities Clause, 42 Hastings Const. L. Q. 213 (2015)..... 2, 7, 13

Upham, The Meanings of the "Privileges and Immunities of Citizens" on the Eve of the Civil War, 91 Notre Dame L. Rev. 1117 (2016)..... 2, 17

TABLE OF AUTHORITIES—Continued

Page

Upham, The Understanding of "Neither Slavery Nor Involuntary Servitude Shall Exist" Before the Thirteenth Amendment, 15 Geo. J. L. & Pub. Pol'y 137 (2017) 2

Wyman, The Law of the Public Callings as a Solution of the Trust Problem, 17 Harv. L. Rev. 156 (1904) 34

Wyman, The Inherent Limitation of the Public Service Duty to Particular Classes, 23 Harv. L. Rev. 339 (1910) 34

BOOKS, TREATISES, AND OTHER MATERIALS

American Annual Cyclopedia (1866) 7

Works of Edmund Burke (1852) 20-21

Barlow, Citizenship and Conscience (1961) 15

Butler, An Essay on the Life of Michel de L'Hospital, Chancellor of France (1814) 13-14

1 Corinthians 24-25

Egle, Life and Times of Andrew Gregg Curtin (1896) 7

TABLE OF AUTHORITIES—Continued

Page

Epstein, Principles For a Free Society: Reconciling Individual Liberty With The Common Good (2002) 30

Green, Equal Citizenship, Civil Rights, and the Constitution: The Original Sense of the Privileges or Immunities Clause (2015) 2, 7, 31

Hale, De Portibus Maris (1670) 4, 29-30, 33-35

Memoirs, Correspondence, and Private Papers of Thomas Jefferson (1829) 9

Kent, Commentaries on American Law (1826) 31-32

Koppelman with Wolff, A Right to Discriminate? (2009) 27

Laycock et al., ed., Same-Sex Marriage and Religious Liberty: Emerging Conflicts (2008) 21

Works of John Locke (12th ed. 1824) 13-14

Official Proceedings of the National Democratic Convention (1872) 12

TABLE OF AUTHORITIES—Continued

Page

Parsons, The Law of Contracts (6th ed. 1873) 31-32

Reams & Wilson, Segregation and the Fourteenth Amendment in the States (1975) 7

Reports Made to the General Assembly of Illinois (1867) 7

Story, Commentaries on the Constitution (1833) 9

Thwaites, ed., Civil War Messages and Proclamations of Wisconsin War Governors (1912) 10

Upham, Exploring "That Unexplored Clause of the Constitution": The Meaning of the "Privileges and Immunities of Citizens" Before the Fourteenth Amendment (2002) 2-3

Papers of George Washington (1996) 13, 15-16

Wyman, The Law Governing Public Service Corporations (1911) 34

IN THE

Supreme Court of the United States

No. 16-111

MASTERPIECE CAKESHOP, LTD.; AND JACK C. PHILLIPS,

Petitioners,

v.

COLORADO CIVIL RIGHTS COMMISSION; CHARLIE CRAIG; AND DAVID MULLINS,

Respondents.

On Writ of Certiorari to the Colorado Court of Appeals

BRIEF OF AMICI CURIAE PROFESSORS CHRISTOPHER R. GREEN AND DAVID R. UPHAM IN SUPPORT OF PETITIONER

INTEREST OF AMICI CURIAE

Amici[1] are widely-published scholars of the Reconstruction Amendments and especially the Four-

[1] Pursuant to this Court's Rule 37.6, counsel for amici curiae certify that this brief was not authored in whole or in part by counsel for any party and that no one other than amici curiae or their counsel has made a monetary contribution to the preparation or submission of this brief. All parties have consented to the filing of this brief.

teenth Amendment's Privileges or Immunities Clause.

Professor Green has published EQUAL CITIZENSHIP, CIVIL RIGHTS, AND THE CONSTITUTION: THE ORIGINAL SENSE OF THE PRIVILEGES OR IMMUNITIES CLAUSE (2015) (hereafter Equal Citizenship); *The Original Sense of the (Equal) Protection Clause: Pre-Enactment History*, 19 Geo. Mason U. Civ. Rts. L.J. 1 (2008); *The Original Sense of the (Equal) Protection Clause: Subsequent Interpretation and Application*, 19 Geo. Mason U. Civ. Rts. L.J. 219 (2009); *Incorporation, Total Incorporation, and Nothing But Incorporation?*, 24 Wm. & Mary Bill Rts. J. 93 (2015); *Duly Convicted: The Thirteenth Amendment as Procedural Due Process*, 15 Geo. J. L. & Pub. Pol'y 73 (2017); and *Twelve Problems with Substantive Due Process*, Geo. J. L. & Pub. Pol'y (forthcoming 2018). Justice Stevens cites Green's work on the Privileges or Immunities Clause in his dissent in *McDonald v. Chicago*, 561 U.S. 742, 859 n.2 (2010).

Professor Upham has published *Interracial Marriage and the Original Understanding of the Privileges or Immunities Clause*, 42 Hastings Const. L. Q. 213 (2015) (hereafter Interracial Marriage); *The Meanings of the "Privileges and Immunities of Citizens" on the Eve of the Civil War*, 91 Notre Dame L. Rev. 1117 (2016) (hereafter Meanings); Corfield v. Coryell *and the Privileges and Immunities of American Citizenship*, 83 Tex. L. Rev. 1483, 1487 (2005) (hereafter Corfield); and *The Understanding of "Neither Slavery Nor Involuntary Servitude Shall Exist" Before the Thirteenth Amendment*, 15 Geo. J. L. & Pub. Pol'y 137 (2017). His doctoral dissertation was entitled Exploring "That Unexplored Clause of the Constitution": The Meaning of the "Privileges

and Immunities of Citizens" Before the Fourteenth Amendment (University of Dallas, 2002). The respondents and amici supporting both sides in *Obergefell v. Hodges*, 135 S.Ct. 2584 (2015), cite Professor Upham's work on interracial marriage.

SUMMARY OF ARGUMENT

This case involves a clash between two appealing claims to inclusion and equality that cannot both be satisfied. Both sides wish to participate in the market free from what they deem unfair, exclusionary discrimination. One side wants to celebrate their marriages, they say, in a market free from private sexual-orientation discrimination; the other side wishes to engage in wedding-related professions free from governmental viewpoint or creedal discrimination. More specifically, same-sex couples claim that, as citizens, they have the right to celebrate on the same basis as other citizens; to be denied wedding-related services by any provider, even if substitutes are available, would, they say, impose serious dignitary harm. Conversely, marriage traditionalists, like the respondent here, simply desire, on a basis of equality with their fellow citizens, to work in the wedding occupations in a manner consistent with their sincerely-held beliefs; to compel participation in same-sex weddings as a condition of participating in such professions would constructively evict marriage traditionalists from the market. Both sides agree that their claimed right to equality—their freedom from what they deem unfair discrimination—depends on whether or not the Constitution permits or prohibits Colorado from enforcing its antidiscrimination law as interpreted and applied here.

The Court can resolve this dispute by looking to the ways that the Republican authors of the Fourteenth Amendment understood the principle of civic equality—equality in the rights of American citizens—expressed in the Privileges or Immunities Clause. Most of the briefing in this case has focused (and will focus) on phrases from the First Amendment, particularly the "freedom of speech" and "free exercise of religion," adopted in 1791. These phrases, however, were not written to restrict the states, but Congress. Fourteenth Amendment history is more directly relevant to a case, like this one, involving the states. While, of course, this Court has held that a substantive component of the Due Process Clause applies freedoms from the First and Second Amendments against the states in the same form that those freedoms restrict the federal government, e.g., *Cantwell v. Connecticut*, 310 U.S. 296 (1940); *McDonald v. Chicago*, 561 U.S. 742, 765 (2010), incorporation of the Bill of Rights through the Due Process Clause is controversial. Rather than relying on a chain from the Due Process Clause to the First Amendment to evidence about equal citizenship, the Court can instead rely directly on equal citizenship as expressed in the Privileges or Immunities Clause.

A great deal of evidence shows that the equal-citizenship principle of the Fourteenth Amendment covers creedal as well as racial discrimination. The history of second-class citizenship for Roman Catholics in England and Ireland imposed by the Test Acts is closely analogous to the burden imposed on Masterpiece here. Finally, Matthew Hale's tripartite division between governmental responsibilities, purely private conduct, and private action "affected with a public interest," which Republicans main-

tained very clearly in the discussions leading to the Civil Rights Act of 1875, favors the petitioner here. The scarcity of substitutes is an essential ingredient of any police-power justification for pushing particular providers out of their professions. Republicans repeatedly confronted pure dignitary harm, severed from tangible impact on the privileges of citizens. They held that "social rights" were sometimes covered by the Fourteenth Amendment, to be sure, but only to the extent that these rights overlapped with tangible impact on the realm of civil rights. Dignitary harm from purely-private social insult was and is, of course, real harm—and a harm that traditional religious believers and all other citizens must endure as well—but it lies beyond the domain of civil rights as such. Restrictions on tangible occupational civil rights cannot be justified on the basis of such purely-privately-inflicted injury.

ARGUMENT

I. The Fourteenth Amendment secures equal civil rights and thus bans second-class citizenship.

Beginning most prominently with John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 Yale L.J. 1385 (1992), recent academic work has argued that the Privileges or Immunities Clause, not the Equal Protection Clause, was the vehicle by which the Fourteenth Amendment constitutionalized the Civil Rights Act of 1866. Just as Article IV guarantees American citizens civil rights equal to the rights of all similarly-situated citizens when visiting other states, free from the restrictions characteristic of alienage, the Privileges or Immunities Clause protects citizens of the United States more generally—against not only interstate but racial and several

other forms of discrimination. President Johnson had asked regarding the freedmen on March 27, 1866, in his veto of the Civil Rights Act, "Four millions of them have just emerged from slavery into freedom. Can it be reasonably supposed that they possess the requisite qualifications to entitle them to all the privileges and immunities of citizens of the United States?" CONG. GLOBE, 39th Cong. 1st Sess. 1679 (1866). Republicans and the nation answered yes, beginning with their override of Johnson's veto on April 9 and, in constitutional form, in John Bingham's proposal of the Privileges or Immunities Clause ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States") to the Joint Committee on Reconstruction on April 21. Just after the Clause was unveiled to the public, the press described the amendment as "intended to secure to all citizens of the United States, including the colored population, the same privileges and immunities." Raleigh, N.C., TRI-WEEKLY STANDARD, May 3, 1866, at 2. Representative Henry Raymond said that Section One "secures an equality of rights among all the citizens of the United States." CONG. GLOBE, 39th Cong. 1st Sess. 2502 (1866). Senator John Conness said that to be "treated as citizens of the United States" is to be "entitled to equal civil rights with other citizens of the United States." *Id.* at 2891. Speaker of the House Schuyler Colfax said in August that the Civil Rights Act's requirement of equality "specifically and directly declares what the rights of a citizen of the United States are." CINCINNATI COMMERCIAL, SPEECHES OF THE CAMPAIGN OF 1866, at 14 (1866). Benjamin Butler said in October 1866 that the Privileges or Immunities Clause would

require "that every citizen of the United States should have equal rights with every other citizen of the United States, in every State." *Id.* at 41. William Dennison summarized the Privileges or Immunities Clause the same month: "[T]he colored man shall have all the personal rights, all the property rights, all the civil rights of any other citizen of the United States." *Id.* at 44. For much, much more, see generally Green, Equal Citizenship, Upham, Interracial Marriage, and Upham, Corfield.

During the ratification process, governors throughout the Union characterized the Privileges or Immunities Clause, or all of Section 1, as a guaranty of equal civil rights: that is, "equal rights and impartial liberty" (Vermont), "equality of right" between the freedmen and white citizens (New York), "equal liberty of all [the Union's] citizens in every State in the Union" (Illinois), for "all citizens of the United States equal civil rights" (Minnesota); "equality before the law" (Wisconsin), "civil equality before the law" (Massachusetts with specific reference to the Privileges or Immunities Clause), and " 'equality before the law' for all citizens" (California). Or more elaborately, Pennsylvania's governor explained that Section 1 would secure "to all classes the benefit of American civilization" such that "all persons, of whatever class, condition, or color should be equal in civil rights before the law." Reams & Wilson, SEGREGATION AND THE FOURTEENTH AMENDMENT IN THE STATES 35, 273, 409, 677, 715 (1975); REPORTS MADE TO THE GENERAL ASSEMBLY OF ILLINOIS 30 (1867); AMERCAN ANNUAL CYCLOPEDIA 518 (1866); Egle, LIFE AND TIMES OF ANDREW GREGG CURTIN 194 (1896).

Chief among these civil rights were economic liberties such as the right to "to pass through or to reside in any other State, for purposes of trade, agriculture, professional pursuits, or otherwise," "to make and enforce contracts" and "to inherit, purchase, lease, sell, hold, and convey real and personal property," and immunity from discriminatory taxation ("exemption from higher taxes or impositions than are paid by the other citizens of the State"), as listed in either the Civil Rights Act or *Corfield v. Coryell*, 6 F.Cas. 546 (E.D. Pa. 1825), as quoted by Senator Howard and many others. See An Act to Protect All Persons in the United States in Their Civil Rights, and Furnish the Means of Their Vindication, 14 Stat. 27 (April 9, 1866); CONG. GLOBE, 39th Cong. 1st Sess. 474-75, 1117-18, 1835, 2765 (1866). Or as Senator John Henderson elaborated, the rights of the citizens include "the right to acquire property, to enter the courts for its protection, to follow the professions, [and] to accumulate wealth." *Id.* at 3035. Hence a central purpose of Section 1, and the Privileges or Immunities Clause in particular, was to secure to all Americans the equal enjoyment of these economic rights.

One way to read the Privileges or Immunities Clause to guarantee equal citizenship is by reading in a tacit baseline of comparison to similarly-situated fellow citizens. Such an implicit baseline was commonplace in readings of provisions securing the rights of citizens, whether readings of the Louisiana Cession's 1803 guarantee of the "rights, advantages, and immunities of citizens of the United States," readings of state constitutional bans on special privileges or immunities, or, most prominently, readings of the comity clause of Article IV. A few

months after the Louisiana Cession, Thomas Jefferson proposed its constitutionalization in a requirement that new citizens "stand, as to their rights and obligations, on the same footing with other citizens of the United States, *in analogous situations*." 3 MEMOIRS, CORRESPONDENCE, AND PRIVATE PAPERS OF THOMAS JEFFERSON 1-2 (1829). Joseph Story's 1833 commentaries inserted an implicit qualifier "under the like circumstances" to his reading of Article IV. COMMENTARIES ON THE CONSTITUTION § 1800, at 674-75 (1833). Horace Biddle, explaining an 1851 Indiana state-constitutional provision that would ban the legislature from granting "to any citizen, or class of citizens, privileges or immunities, which, upon the same terms, shall not equally belong to all citizens," that "it only means that every citizen may apply under the same circumstances and on similar terms." REPORT OF THE DEBATES AND PROCEEDINGS OF THE CONVENTION FOR THE REVISION OF THE CONSTITUTION OF INDIANA 1394 (1851). Responding on April 7 to President Johnson's veto of the Civil Rights Act, Representative William Lawrence repeated Story's Article IV interpolation, referring to "'all the privileges and immunities of citizens,' that is, all citizens under the like circumstances." CONG. GLOBE, 39th Cong. 1st Sess. 1836 (1866).

II. The Fourteenth Amendment's ban on second-class-citizenship includes creedal discrimination.

Besides racial discrimination, what other forms of discrimination violate equal citizenship? There is, of course, room for significant disagreement about the scope of such a principle, and the Court need not settle that precise scope in this case.

Since the framing of the Amendment, racial disparities in the rights of citizens of the United States obviously have taken center stage. Still, it seems clear that the Fourteenth Amendment, according to its original meaning and purpose, the way in which religious liberty had long been described in terms of equal citizenship, and according to the repeated dicta of this Court, protects equal citizenship against not only racial discrimination, but also viewpoint or creedal discrimination.

A. Original Meaning.

Republicans took distinctions based on religion or belief to be clear instances of the sort of second-class citizenship against which the Privileges or Immunities Clause was aimed. Roscoe Conkling, while a member of the Joint Committee that was privately drafting the Amendment, publicly insisted that any reconstruction plan must include "[t]he assurance of human rights to all persons within their borders, regardless of race, creed, or color." *Id.* at 252. Contemporaneously Wisconsin's governor advocated a constitutional amendment that would protect "the sacred natural rights of the humblest citizen, whatever may be that citizens' creed or color," including the freedom to make and enforce contracts, and "to pursue any and all avocations for which he is qualified." Thwaites, ed., CIVIL WAR MESSAGES AND PROCLAMATIONS OF WISCONSIN WAR GOVERNORS 266 (1912). And in the state's legislature during ratification debates, a leading proponent said it secured "equal rights of all, regardless of color, race, or creed." Chicago Tribune, Feb. 12, 1867, at 2.

During the debates over the Civil Rights Act, participants saw that the principle of equal civil rights

implicated creedal as well as racial discrimination. Senator Edgar Cowan protested against the application of civil rights laws in the North, where, he said, people already stood on the "same footing," "no matter what may be his color, his complexion, or his creed." CONG. GLOBE, 39th Cong. 1st Sess. 335 (1866). William Lawrence responding to the Civil Rights Act veto said that the bill was "not made for any class or creed, or race or color," but would "protect every citizen, including the millions of people of foreign birth who will flock to our shores to become citizens and to find here a land of liberty and law." *Id.* at 1833. Democrat Garrett Davis, opposing federally-enforced racial civic equality, recognized that religious civil equality stood on the same basis. *Id.* at 419, 1415. Representative Koontz declared Republican hostility to all "systems built upon caste and creed for the oppression of man." CONG. GLOBE, 39th Cong. 2nd Sess. 596 (1867).

Indeed, to explain the civil equality mandated by the Amendment, proponents frequently relied upon a Jeffersoninan principle that had originally dictated creedal equality. In his First Inaugural Address, Jefferson had listed, as first among the "essential principles of our Government," "[e]qual and exact justice to all men, of whatever state or persuasion, religious or political." CONG. GLOBE, 39th Cong. 1st Sess. 120 (1866) (quoting Jefferson). Republicans understood that this principle, fully elaborated, also precluded racial discrimination. Hence John Bingham, during the ratification debates, explained that Section 1 was "a simple, strong, plain declaration that equal laws and *equal and exact justice* shall hereafter be secured within every State, of this Union." CINCINNATI COMMERCIAL, SPEECHES OF THE

CAMPAIGN OF 1866 at 19 (1866). Accordingly, in their 1872 national platform, Republicans celebrated the Amendment for decreeing the "the equal citizenship of all," called for "[c]omplete liberty and exact equality in the enjoyment of all civil, political, and public rights," and thus decried all "discrimination in respect of citizens by reason of race, creed, color, or previous condition of servitude." 2 CONG. REC. 423 (1874) (quoting 1872 platform). In their platform of the same year, Democrats announced their acquiescence to the Amendment and pledged "equal and exact justice to all, of whatever nativity, race, color or persuasion, religion or politics." OFFICIAL PROCEEDINGS OF THE NATIONAL DEMOCRATIC CONVENTION 40 (1872). More authoritatively, in the preamble to the 1875 Civil Rights Act, Congress likewise treated race and creed as similarly illegitimate bases for discrimination:

> Whereas it is essential to just government we recognize the equality of all men before the law, and hold that it is the duty of government in its dealings with the people to mete out equal and exact justice to all, of whatever nativity, race, color, or persuasion, religious or political; and it being the appropriate object of legislation to enact great fundamental principles into law.

An Act to Protect All Citizens in Their Civil and Legal Rights, 18 Stat. 335 (March 1, 1875); *see also* 3 CONG. REC. 1866, 1867, 1870 (1875) (Senator Edmunds and Bayard elaborating on similarity).

Both earlier and later history supply similar evidence for the rough equivalence of racial and creedal discrimination in provisions guaranteeing the rights

of citizens. An 1840 joint committee of the Massachusetts legislature compared interracial-marriage bans to interreligious-marriage bans, noting that the latter had been widely understood by Protestants to have "deprived them of the rights of citizens." Upham, Interracial Marriage, at 240-41. John Bright argued in 1855 that the "rights, advantages, and immunities of citizens of the United States" (promised in 1803 to those in Louisiana), the "privileges, rights, and immunities of the citizens of the United States" (promised in 1819 to those in Florida), and the "the rights of citizens of the United States" (promised in 1848 to those in the Southwest) each represented an "assurance of entire equality" to Roman Catholics. Nashville Daily Union and American, Nov. 7, 1855, at 2. Sitting as a circuit justice in 1870, Justice Bradley said the Privileges or Immunities Clause enforced the "entire equality of all creeds and religions before the law." *Live-Stock Dealers' & Butchers' Association v. Crescent City Live-Stock Landing & Slaughter-House Co.*, 15 F.Cas. 649, 653 (D.La. 1870).

B. Religious-Liberty Background.

Many classic arguments for religious freedom, including those of Locke, Madison, and Washington, rest squarely on equal citizenship.

In the midst of seventeenth-century French disputes between Hugenots and Roman Catholics, Michel de L'Hospital put the case for religious freedom in terms of equal citizenship: "All citizens who obey the laws and perform their duties to their country and their neighbor have an equal right to the advantages which civil society confers." Charles

Butler, AN ESSAY ON THE LIFE OF MICHEL DE L'HOSPITAL, CHANCELLOR OF FRANCE 28-29 (1814).

In his Essay on Toleration, John Locke analogized religiously-based second-class citizenship—that is, the failure to allow religious minorities "the same privileges as other citizens"—to its racially-based cousin:

> Suppose this business of religion were let alone, and that there were some other distinction made between men and men, upon account of their different complexions, shapes and features, so that those who have black hair, for example, or grey eyes, should not enjoy the same privileges as other citizens; that they should not be permitted either to buy or sell, or live by their callings; that parents should not have the government and education of their own children; that they should either be excluded from the benefit of the laws, or meet with partial judges: can be it doubted but these persons, thus distinguished from others by the colour of their hair and eyes, and united together by one common persecution, would be as dangerous to the magistrate, as any others that had associated themselves merely upon the account of religion?

5 WORKS OF JOHN LOCKE 49-50 (12th ed. 1824) (orig. 1685).

James Madison's 1785 Memorial and Remonstrance, which this Court has invoked countless times, claimed that a proposed religious assessment "degrades from the equal rank of Citizens all those whose opinions in Religion do not bend to those of

the Legislative authority." *Everson v. Board of Education*, 330 U.S. 1, 69 (1947) (quoting this language from Madison); *Lee v. Weisman*, 505 U.S. 577, 607 n.10 (1992) (Blackmun, Stevens, and O'Connor, concurring) (same); *id.* at 622 (Souter, Stevens, and O'Connor, JJ., concurring) (same); *McCreary County v. ACLU*, 545 U.S. 844, 878 (2005) (same); *see also Reynolds v. United States*, 98 U.S. 145, 163 (1879) (relying on Memorial). Madison advocated "protecting every citizen in the enjoyment of his Religion with the same equal hand." *Everson*, 330 U.S. at 68. In Congress four years later, Madison's initial proposal for religious rights likewise spoke of the abridgement of "civil" rights, i.e., the rights of citizens: "The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, nor on any pretext, infringed." 1 ANN. CONG. 434 (1789).

In England later the same year, 1789, dissenters against the Church of England claimed to be "entitled, equally with their fellow subjects to the complete possession of civil and religious liberty," that is, to "enjoy the immunities of faithful citizens." Richard Burgess Barlow, CITIZENSHIP AND CONSCIENCE 255 (1961). The next year, Anna Barbauld hoped that religious liberty might "bury every name of distinction in the common appellation of citizen." *Id.* at 277.

In the United States in the summer of 1790—while the First Amendment was still pending before the states—Moses Seixas of the Hebrew congregation of Newport wrote to George Washington and commended the United States in terms that clearly prefigure the Privileges or Immunities Clause:

> Deprived as we heretofore have been of the invaluable rights of free Citizens, we now (with a deep sense of gratitude to the Almighty disposer of all events) behold a Government, erected by the Majesty of the People—a Government, which to bigotry gives no sanction, to persecution no assistance—but generously affording to All liberty of conscience, and immunities of Citizenship: deeming every one, of whatever Nation, tongue, or language, equal parts of the great governmental Machine.

Washington's famous reply the next day repeats Seixas's language on the equal "immunities of citizenship":

> The Citizens of the United States of America have a right to applaud themselves for having given to mankind examples of an enlarged and liberal policy: a policy worthy of imitation. All possess alike liberty of conscience and immunities of citizenship. It is now no more that toleration is spoken of, as if it was by the indulgence of one class of people, that another enjoyed the exercise of their inherent natural rights. For happily the Government of the United States, which gives to bigotry no sanction, to persecution no assistance requires only that they who live under its protection should demean themselves as good citizens, in giving it on all occasions their effectual support.

6 PAPERS OF GEORGE WASHINGTON 284-86 (1996) (orig. August 17 and August 18, 1790).

C. Original Purpose.

Undoubtedly the principal discrimination targeted by the Fourteenth Amendment was racial. Still, a secondary purpose was to protect the equal right of all citizens, regardless of opinion, to travel, reside, and engage in business throughout the Union. For decades before the drafting of the Amendment, antislavery Americans had argued that their constitutional "privileges and immunities" entitled them to travel, reside, and conduct lawful business throughout the Union, free from exclusion on the basis of their opinions. Intolerance in heavily pro-slavery and (later) pro-secession areas was so great that many Americans were effectively excluded from travel and commerce in many states. On the eve of the Civil War, the Republican Party's national platform contained this resolution,

> That we deeply sympathize with those men who have been driven, some from their native States and others from the States of their adoption, and are now exiled from their homes on account of their opinions; and we hold the Democratic Party responsible for this gross violation of that clause of the Constitution which declares that the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States.

For discussion, see Upham, Meanings, at 1151–59.

This danger persisted after the War, as there remained widespread intolerance in the South. During the ratification debates, Maryland's Senator John Cresswell explained that Section 1 was designed to meet this enduring threat:

> The States have assailed those principles of personal liberty and personal security. If a citizen of the United States went to South Carolina, and claimed to exercise the privileges and immunities which he was free to exercise in other states, the State sometimes refused to allow him so to do. So in some of the Rebel States the people say now, that loyal men shall not settle among them. We intend by these provisions.... that wherever in this broad land, any man, a citizen of the United States, shall be assailed in any of his rights of life, liberty or property, he shall be able to throw around his shoulders the protecting aegis of the Stars and Stripes, and say. "I am an American citizen, and no man dare assail me, because the Constitution and the laws protect me the world over."

Reconstruction, The Cecil Whig, May 26, 1866, at 2.

Although brutal violence was the primary threat faced by antislavery and Unionist citizens, proponents of the Amendment also sought to preclude economic sanctions. Bingham, for instance, argued that the Amendment was essential to protect northern citizens, residing in the South, from "being taxed to the point of confiscation"—which was, he said, not a "chimerical evil," for the former rebels "are doing worse than this all the time." *John A. Bingham*, Chicago Tribune, Dec. 12, 1868, at 2.

D. This Court's Statements.

This Court in its Fourteenth Amendment jurisrpduence has repeatedly affirmed, albeit in dicta, that the Amendment prohibits creedal as well as

racial discrimination. In *American Sugar Refining Co. v. Louisiana*, 179 U.S. 89 (1900), this Court insisted that a state tax discriminating on the basis of "color, race, nativity, religious opinions, political affiliations," or similar bases would be "a denial of the equal protection of the laws to the less favored classes," *id.* at 92; *see also Edwards v. California*, 314 U.S. 160, 185 (1941) (Roberts, J., concurring) (contending that indigence was "constitutionally an irrelevance, like race, creed, or color"); *Plessy v. Ferguson*, 163 U.S. 537, 558 (1896) (Harlan, J., dissenting) (indicating that compulsory racial segregation is as unconstitutional as compulsory religious or national-origin segregation).

This Court's religion-clause cases have long been shot through with notions of equal citizenship. For a few instances in addition to the quotations of Madison's 1785 Memorial and Remonstrance noted above, see, e.g., *Employment Division v. Smith*, 494 U.S. 872, 897 (1990) (O'Connor, J., concurring) ("equal place in the civil community"); *Town of Greece v. Galloway*, 134 S.Ct. 1811, 1834 (2014) (Alito, J., concurring) ("the equal benefits of citizenship"); *id.* at 1841 (Kagan, J., dissenting) ("full and equal American citizens"; "[W]hen each person performs the duties or seeks the benefits of citizenship, she does so not as an adherent to one or another religion, but simply as an American."); *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S.Ct. 2012, 2020 (2017) ("an equal share of the rights, benefits, and privileges enjoyed by other citizens") (quoting *Lyng v. Northwest Indian Cemetery Protective Association*, 485 U.S. 439, 449 (1988)); *id.* at 2024 (quoting H.M. Brackenridge in 1818) ("odious exclusion from

any of the benefits common to the rest of my fellow-citizens").

Whatever dangers of destablization, then, might be thought possible from the resurrection of the Privileges or Immunities Clause in other contexts, see, e.g., *McDonald v. Chicago*, 561 U.S. 742, 859-60 (2010) (Stevens, J., dissenting) ("the original meaning of the [Privileges or Immunities] Clause is ... not nearly as clear as it would need to be to dislodge 137 years of precedent"), explicitly rooting an equal-citizenship principle into the text of the Fourteenth Amendment would "dislodge" nothing: such a principle is itself already firmly lodged in this Court's precedents, and equal citizenship for adherents of all religions is no longer even mildly revolutionary. Reliance on Privileges or Immunities Clause history would in fact be profoundly stablizing, by supplying the equal-citizenship principle with both a secure anchor and a guide for the principle's precise reach. An equal-citizenship principle derived from the Privileges or Immunities Clause can and should be bound by the original public meaning of the Fourteenth Amendment's text.

III. The exclusion of traditionalists from wedding-related professions is strongly akin to the anti-Catholic Test Acts.

For about 150 years—from the 1670s to the 1820s—Roman Catholics in England and Ireland were statutorily excluded from a range of professions, including the law, education, and any field requiring more than two apprentices. Edmund Burke described the disabilities on Roman Catholics in terms of second-class citizenship, referring to "that equality, without which you never can be FELLOW-

CITIZENS," 4 WORKS OF EDMUND BURKE 494 (1852), and in terms of "a lower and degraded state of citizenship," *id.* at 513. As Douglas Laycock has noted,

> [O]ccupational exclusions have an odious history. The English Test Acts and penal laws long excluded Catholics from a range of occupations, including positions of responsibility in the civil and military service, solicitors, barristers, notaries, school teachers, and most businesses with more than two apprentices. These occupational exclusions are one of the core historical violations of religious liberty, and of course this history was familiar to the American Founders.

Afterword, in Laycock et al., eds., SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS 201, 296 (2008). Burke's view of Catholic second-class citizenship was, moreover, well-known to Reconstruction Republicans. Thomas Williams, for instance, analogized Burke's description of Roman Catholic disabilities and "lower and degraded ... citizenship" to the plight of the freedmen. CONG. GLOBE, 39th Cong. 1st Sess. 791 (1866).

At least some opponents and supporters of the Amendment affirmed that it would prohibit the retroactive occupational limits imposed in some states against the former secessionists. Just after Congress approved the Amendment, one newspaper taunted that "it is a nice question for Missouri and Tennessee radicals to decide, how, under this amendment, they could make their test oath work with [the Privileges or Immunities Clause]." *Constitutional Amendment*, The Weekly Caucasian, June 20, 1866, at 2. The Supreme Court struck down such

limits in *Cummings v. Missouri*, 71 U.S. 277 (1867), and *Ex Parte Garland*, 71 U.S. 333 (1867), while states were ratifying the Fourteenth Amendment. Senator Matthew Carpenter appealed at length to *Cummings* and *Garland* in explaining the Privileges or Immunities Clause in February 1872, calling *Cummings* the "best definition I know" for the privileges of citizens of the United States. While Cummings merely described such rights in explaining the baseline for punishment, Senator Carpenter applied *Cummings*'s statement that in America, "all avocations, all honors, all positions are alike open to everyone," 71 U.S. at 321, directly to the Privileges or Immunities Clause. CONG. GLOBE, 42nd Cong. 2nd Sess. 762 (1872). The Privileges or Immunities Clause, said Carpenter, "offers all the pursuits and avocations of life to the colored man, in all the States of the Union." *Id.* Further, *Cummings* cited religiously-based occupational restrictions for support of its view that such restrictions are the sort of punishment covered by the bill-of-attainder and ex-post-facto-law prohibitions. 71 U.S. at 320-21. More recently, the Court has recognized imposing conditions on benefits can "reduce[] [an] individual ... to second-class citizenship" just as effectively as a direct penalty. *Speiser v. Randall*, 357 U.S. 513, 536 (1958) (Douglas, J., concurring). Of course, the Court need not hold that the right to enter an occupation is an exceptionless right guaranteed to literally *all* citizens of the United States; it need merely hold that *religious* occupational exclusions are, prima facie, abridgements of the privileges or immunities of citizens of the United States.

Today's information technology turns public-accommodations laws into a modern-day Test Act.

Whatever the circumstances of the particular same-sex couples whose wedding plans have led to the cases before the Court, affirming the judgment here will allow other plaintiffs to seek out traditionally-minded wedding professionals *precisely in order to be denied service* and thereby force such professionals out of public life. If the penalties in individual cases are not high enough to force bakers like Williams out of their professions,[2] potential penalties from the indefinitely-numerous *possible* plaintiffs surely will be. A loss by Masterpiece here will inevitably weaponize public-accommodations law.

Like the law at issue here, the Test Acts excluded by compelling the disfavored group to do something irreconcilable with their beliefs. Anti-Roman-Catholic legislation generally required citizens to endorse some proposition, usually the oath against transubstantiation, in order to exercise participate in a particular profession: "I, N, do declare that I do believe that there is not any transubstantiation in the sacrament of the Lord's Supper, or in the elements of the bread and wine, at or after the consecration thereof by any person whatsoever." Test Act, 25 Car. II, c. 2, § 8, 5 STATUTES OF THE REALM 782, 784 (1673). This is, in itself, not strictly a religious statement—an atheist would have no problem agreeing to it, for instance—but rather a secular statement to which Roman Catholics would of course have

---

[2] While the Commission has left unstated what punitive sanctions await if Masterpiece disobeys its cease-and-desist order is not clear, obviously such penalties would be designed to force obedience. Oregon, for instance, ordered a similar baker in that state to pay $135,000 plus interest. See *In re Klein*, Nos. 44-14 & 45-14 (Ore. Bureau of Labor and Industries, July 2, 2015), available at goo.gl/WO8Jvh, at 42.

religious objections. Requiring bakers to affirm the propriety of same-sex marriage—a secular statement to which many bakers would object on religious grounds—would be directly analogous to the Test Acts.

To be sure, Colorado here demands of Jack Phillips not words but his creation of the centerpiece of a wedding celebration. However, religious market participants who take rituals, customs, and ceremonies seriously have long faced the need to guard against participating in the message that such traditions are designed to express. Religious believers' assessment of endorsement—that is, their evaluation of the message *God* thinks is conveyed, in context, by particular symbols—of course raises difficult theological questions. Paul told the Corinthians, for instance, that it was not wrong to eat, outside of a temple, meat that *might* have been sacrificed to idols; members of the Corinthian church buying their dinners were not required to pry into sellers' religious practices to assess how animals had been killed. Eating idolatrously-sacrificed meat, *explicitly presented as such*, however, or eating it in a temple, was an improper endorsement, according to Paul: "Eat whatever is sold in the meat market without raising any question on the ground of conscience. ... If one of the unbelievers invites you to dinner and you are disposed to go, eat whatever is set before you without raising any question on the ground of conscience. But *if someone says to you*, 'This has been offered in sacrifice,' then do not eat it." 1 Cor. 10:25, 27-28 (emphasis added); 1 Cor. 8:10 ("[I]f anyone sees you who have knowledge eating in an idol's temple, will he not be encouraged, if his conscience is weak, to eat food offered to idols?").

Careful attention to the role of locations and customs is of course required to apply such principles today.

Whatever the medium, compelling expression to which citizens object on religious grounds clearly has the potential to impose second-class citizenship on those citizens. Roman Catholics were asked to say it with oaths, the Corinthians with meat, Baronelle Stuntzman with flowers, Elane Photography with photos, and Masterpiece with wedding cakes. But the legitimacy of occupational qualifications should of course not turn on the language of communication.

Indeed, those who advocate bans on private discrimination out of a concern for "disrespect"—as the court below did in analogizing the case to official state discrimination in *Obergefell v. Hodges*, 135 S.Ct. 2604 (2015), see *Craig v. Masterpiece Cakeshop*, 370 P.3d 272, 281 (Colo. App. 2015)—make clear that the rationale of applying public-accommodation laws is precisely to require professionals to send a particular message, not merely to allow access to goods and services. *See also State v. Arlene's Flowers, Inc.*, 389 P.3d 543, 851 (Wash. 2017) ("[P]ublic accommodations laws do not simply guarantee access to goods or services"); *Elane Photography, LLC v. Willock*, 309 P.3d 53, 80 (N.M. 2013) (Bosson, J., concurring) (requirement to convey a "sense of respect" is the "price of citizenship"); *In re Klein*, Nos. 44-14 & 45-14 (Ore. Bureau of Labor and Industries, July 2, 2015), available at goo.gl/WO8Jvh, at 32, 33 ("This case is not about a wedding cake or a marriage," but about cakeshop's "clear and direct statement"); USA Today, *Gay Marriage: Siding with Religious Baker is Problematic*, June 26, 2017, goo.gl/aJSM3R ("[T]he right of

same-sex couples to marry is the law of the land. As Justice Anthony Kennedy wrote in his 2015 majority opinion, 'The Constitution promises liberty to all within its reach, a liberty that includes specific rights that allow persons, within a lawful realm, to define and express identity.' *Why would the court now want to countenance people who object to that?*') (emphasis added). The entire *point* of applying public-accommodations laws to professionals like Masterpiece, under rationales like these, is to compel them to either express a more positive attitude toward same-sex marriage or leave public life.

IV. Mere privately-inflicted dignitary harm in a market with readily-available substitute goods does not justify restrictions on others' civil rights.

The fact that professionals with moral or religious objections to same-sex marriage will face occupational restrictions if they are required to provide goods and services to such ceremonies does not *quite* end the case. Even robust interpretations of the Privileges or Immunities Clause make a tacit exception for the promotion of health, safety, and morals. See *Bartemeyer v. Iowa*, 85 U.S. 129, 138 (1874) (Field, J., concurring). Republican adoption of the Civil Rights Act of 1875 makes plain that the Fourteenth Amendment does not embody an unqualified, unlimited right of all businesses to deny service to customers for any reason. The Fourteenth Amendment clearly continues an English common-law tradition allowing many sorts of market intervention. Those interventions, however, are themselves not unlimited. The interests as stake here clearly lie outside the police power as the English and American com-

mon-carrier traditions and Reconstruction Republicans construed those limits.

Republicans took the Fourteenth Amendment to embody a common-law tradition that justified market interventions to promote freedom of competition or supply a remedy when such competition is impossible, as with local natural monopolies. Without even an *assertion* here of any state-granted or natural monopoly, reflected in a scarcity of substitute goods and services, there is no justification for pushing Masterpiece out of the market. Indeed, as modern technology lowers the costs of locating alternative wedding professionals to the vanishing point, such a police-power justification grows weaker every day.

At many times in the past, public accommodations law has been the only vehicle for promoting tangible access to the market for the victims of private discrimination. Where such tangible access is at stake, there will of course be difficult borderline cases in which those tangible interests must be weighed against costs for religious liberty. But this case is not a difficult one, because there *are* no tangible issues of marketplace access for same-sex couples. The state has not even attempted to show that other cakeshops are not standing by to meet the full complement of same-sex couples' celebratory needs. No natural monopoly even arguably justifies imposing common-carrier-style duties on Masterpiece. *Cf.* Andrew Koppelman with Tobias Wolff, A RIGHT TO DISCRIMINATE? 108, 117 (2009) ("The position in society of the BSA is not that of one small booth in the pluralist bazaar"; possible that "the BSA possesses a quasi-monopoly over a valuable cultural resource"); Koppelman, *Gay Rights, Religious Ac-*

commodations, and the Purposes of Antidiscrimination Law, 88 S. Cal. L. Rev. 619, 652-53 (2015) ("[T]he human costs of refusing accommodation are serious... the costs of accommodation in any particular case are trivial ... the refusal to accommodate is therefore irrational."); *id.* at 645 ("[T]he burden on Vanessa Willock of being refused service, even if one counts the stress, is less than the burden on Elaine Huguenin of going out of business.").

Prior to their enactment of the Civil Rights Act of 1875, Republicans gave a great deal of attention to the nature of common-carrier-style rights and their relationship to the Privileges or Immunities Clause. To be sure, these discussions reveal *some* intra-Republican disagreement and fuzziness about the precise edges of the relevant categories. In response to religious-liberty concerns, for instance, Republicans removed churches and cemeteries from the bill; several Republicans argued compellingly that such exclusions were constitutionally compelled, even in cases where a single local church or cemetery might be said to have something like a natural monopoly. See Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 Va. L. Rev. 947, 1050-51 (1995). The Congressional Globe and Congressional Record also, however, display a great deal of consensus among Republicans and continuity between the Fourteenth Amendment and the English common-law tradition. Republicans consistently justified market interventions the same way as had traditional English law.

By the time of Reconstruction, the English and American law of public accommodations had long made a three-fold division of rights first marked

crisply by Chief Justice Matthew Hale's 1670 treatise DE PORTIBUS MARIS (Concerning the Gates of the Sea):

- a purely private/social *ius privatum* outside governmental power,
- a purely governmental *ius regium* consisting of the government's own responsibilities, such as the protection of life and property and the operation of a system of criminal and civil justice, and
- the *ius publicum*, the overlapping civic/social realm in which common carriers and other businesses "affected with a public interest" operate.

Francis Hargrave, ed., A COLLECTION OF TRACTS RELATIVE TO THE LAW OF ENGLAND 45-113, 78 (1787). Hale's three-fold distinction was incorporated to English law in *Allnutt v. Inglis*, 104 Eng. Rep. 206 (K.B. 1810), and thence into American substantive-due-process law in *Munn v. Illinois*, 94 U.S. 113, 125-29 (1877), which reviewed both Hale and *Allnutt* in great detail. Hale's views had been amply received into American law, however, well before *Munn*; one court noted of *De Jure Maris*, a companion essay to *De Portibus Maris*, citing five earlier cases, that "its authority has been repeatedly recognized in this country." *Young v. Harrison*, 6 Ga. 130, 142 (1849).

Allnutt and *Munn* both quote Hale's rationale for imposing special duties of a wharf not to charge excessive rates: "because they are the wharfs only licensed by the Queen, or because there is no other wharf in that port." *Allnutt*, 104 Eng. Rep. at 211; *Munn*, 94 U.S. at 127 (both quoting Hale at 77). With other wharves available, competititon will of course

prevent an owner from being able to charge exotoriionate prices. The extent of legal and natural monopolies—i.e., the lack of a readily-available substitute goods and services—mark the furthest extent of any police-power justification for imposing common-carrier-style rights on private parties. Private rate-setting in a genuinely competitive market, like the purely-private racial insult discussed at length by Reconstruction Republicans, is beyond state power. Richard Epstein's work canvasses the economic background and later history at length. *Public Accommodations Under the Civil Rights Act of 1964: Why Freedom of Association Counts as a Human Right*, 66 Stan. L. Rev. 1241, 1249-53, 1261-63 (2014); *The History of Public Utility Rate Regulation in the United States Supreme Court: Of Reasonable and Nondiscriminatory Rates*, 38 J. Sup. Ct. Hist. 345, 346-50 (2013); PRINCIPLES FOR A FREE SOCIETY: RECONCILING INDIVIDUAL LIBERTY WITH THE COMMON GOOD 279-318 (2002).

Sumner and other Republicans made very clear that the overlapping civic/social realm—Hale's *ius publicum*—must be desegregated and purged of insulting stigmatic harm. Sumner famously summarized the message of segregation: "I am better than thou, because I am white. Get away!" CONG. GLOBE, 42nd Cong. 2nd Sess. 383 (1872). This was not a message that would be tolerated in the realm of common carriers under a legal obligation to serve the public on equal terms. *Outside* the civic ream, however—that is, outside the ream of the "privileges or immunities of citizens," in Hale's *ius privatum*—Sumner and other Republicans recognized that freestanding stigmatic injury could and would be legally inflicted. Democrats accused Republicans of

enforcing purely private social rights, rather than civil rights, in the Civil Rights Act of 1875, but Republicans steadfastly denied the charge. The social/civic distinction was genuine, they said repeatedly; the two realms *overlapped* but were not *identical*. This is what it means to have a separate *ius publicum* (the overlapping sphere) and *ius privatum* (the purely-social sphere). And Republicans, most definitely including Sumner, acknowledged the existence of a purely social realm as well as the mixed civil-social one. See Green, Equal Citizenship, at 207-211 (explanations from Senators James Alcorn, Henry Arnthony, Matthew Carpenter, James Flanagan, Frederick Frelinghuysen, John Sherman, and Charles Sumner, and Representatives Alonzo Ransier and William H.H. Stowell); *id.* at 106-07 (explaining civic-social distinction in context of racial insult of Ransier on the floor of the House); *Bell v. Maryland*, 378 U.S. 226, 313 (1964) (Goldberg, J., concurring) ("[T]he Congress that enacted the Fourteenth Amendment was particularly conscious that the 'civil' rights of man should be distinguished from his 'social' rights. ... [R]ights pertaining to privacy and private association are themselves constitutionally protected liberties.").

In the same speech in which Sumner condemned segregation so eloquently, he launched into a detailed exposition of the law of common carriers, a law quite conspicuously English in origin. Sumner himself begins with English precedents, *see* CONG. GLOBE, 42nd Cong. 2nd Sess. 383 (1872), and the treatises on which he relied—Justice Story on bailments, Kent's Commentaries, Theophilus Parsons on contracts, and Chamber's Encyclopedia—are all squarely rooted in English law. Chancellor Kent

proclaimed in this context, "[W]e cannot but admire the steady and firm support which the English courts of justice have uniformly and inflexibly given to the salutary rules of law on this subject." 2 COMMENTARIES ON AMERICAN LAW 602 (1826). This Court has itself recognized the continuity between English common law, Sumner's approach in 1872, and *Munn*. See *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston*, 515 U.S. 557, 571 (1995) (citing and quoting English cases); *id.* (following *Bell v. Maryland*, 378 U.S. 226, 298 n.17 (1964) (Goldberg, J., concurring), in turn associating *Munn* and Sumner's January 1872 explanation of the common law with English cases).

One of the cases cited by Theophilus Parsons at the point at which Sumner cites the treatise nicely illustrates the sort of natural monopoly for which common-carrier-style innkeeper's duties would apply. See CONG. GLOBE, 42nd Cong. 2nd Sess. 383 (1872) (citing and quoting "Professor Parsons, in his work on Contracts, so familiar to lawyers and students"); Theophilus Parsons, 2 THE LAW OF CONTRACTS 163 n.z (6th ed. 1873) (citing *Hawthorn v. Hammond*, 174 Eng. Rep. 866, 868-69 (1844) for the proposition for which Sumner quotes the treatise). The plaintiff in *Hawthorn* claimed to have knocked with his brother at the door of the defendant's inn at ten o'clock at night "for ten minutes or a quarter of an hour," after which they "tried to obtain accommodation at a beer house," found the beer-house full, then came back to the defendant's inn, knocked again without success, and therefore were "obliged to go on to Bridgenorth." A jury issue was presented on whether the defendant heard the knocking and whether, if so, the defendant could have reasonably

concluded that the plaintiff and his brother "were drunken persons, who had come to make a disturbance." The "trouble, inconvenience, and expense" caused by the scarcity of alternative sleeping accommodations—mid-nineteenth-century late-night travel to a different town—is plainly absent here.

Joseph Singer's reboot of the public-accommodations origin story, *No Right to Exclude: Public Accommodations and Private Property*, 90 Nw. U. L. Rev. 1283, 1292 (1996) (hereafter No Right), claims that a natural-monopoly justification for, and limit on, common-carrier law was "the invention of" Harvard Law Professor Bruce Wyman. However, while Singer's article is massive—215 pages—its omissions are glaring and fatal. Singer does not even mention De Portibus Maris or *Allnutt*, the classic English monopoly-based explanations of the law of common carriers. Appearing in 1670 and 1810, they decisively cut the legs from under Singer's claim that such justifications arose only after the Civil War. Singer's specific claim regarding English law—his "no" to the question "Specifically, did the idea of monopoly or the idea of a government license have anything to do with it, as suggested by later scholars?," *id.* at 1303—is just wrong, as is Singer's emphatic claim of a complete absence of monopoly justification in antebellum cases, *id.* at 1319 ("it is important to note that *none* of the antebellum cases bases the duty to serve on the fact of monopoly," emphasis in original).[3]

---

[3] In addition to his failure to mention *Allnutt*, the most prominent English case giving a monopoly justification for common carriers' duties, Singer also appears to mention *none* of the twenty American antebellum "representative cases about the

Calling Professor Wyman "the progenitor of the monopoly theory," *id.* at 1329, Singer cites, and quotes at length, two short (18- and 14-page) articles of his: *The Law of the Public Callings as a Solution of the Trust Problem*, 17 Harv. L. Rev. 156 (1904) (Public Callings), and *The Inherent Limitation of the Public Service Duty to Particular Classes*, 23 Harv. L. Rev. 339 (1910). However, Singer fails to mention Wyman's 706-page treatise, THE LAW GOVERNING PUBLIC SERVICE CORPORATIONS (1911) (Public Service), which, like the articles, is an extended explanation of "the distinction between the private callings—the rule—and the public callings—the exception." *Id.* at vi; *cf.* Public Callings at 156 (beginning with same phrase). While Wyman's short articles do not mention Hale, *Allnutt*, and *Munn*, his treatise cites them repeatedly, see Public Service at 14, 16, 44, 46, 56, 78-80, 122, 158, 170, 203, 255-56, 284, and calls the monopoly-based passage from Hale's De Portibus Maris distinguishing the *ius privatum* from *ius publicum* "the most famous paragraph in the whole law relating to public service." *Id.* at 14. Singer complains that Wyman was "misreading the older law," No Right at 1408, but fails even to mention Wyman's central sources.

In addition to completely missing Hale and *Allnutt*, Singer barely mentions *Munn*, which of course itself discussed Hale and *Allnutt* extensively. Singer says only that *Munn* "justified legislative regulation of businesses 'affected with a public interest,' " No

---

monopoly characteristics of common carriers and their franchises and licenses" listed in Avins, *The Civil Rights Act of 1875: Some Reflected Light on the Fourteenth Amendment and Public Accommodations*, 66 Colum. L. Rev. 873, 888 n.80 (1966).

Right at 1403, claiming that "it was not clear whether this category would be broad or narrow." But *Munn*'s category, taken from Hale, is unclear only if we ignore Hale and *Allnutt*'s natural-or-artificial-monopoly rationale for it.

Sumner's appropriation of English law into the Fourteenth Amendment makes clear that *Munn* was right to associate the American law of common carriers tightly with Chief Justice Hale's economic rationale. *Munn*'s use of substantive due process as the vehicle for Hale's limits on that law was a second-best accommodation to the premature death of the Privileges or Immunities Clause in 1873; even if it got the clause wrong, the constitutionalization decision itself—that common-carrier-style price regulations may be unconstitutional in "some circumstances ... but not under all," 94 U.S. at 125, was sound.

Munn's explanation of Hale and cases like *Alnutt* fits perfectly with Republican explanations of the Privileges or Immunities Clause; the Court repeatedly refers to "citizens" and other language from the Clause. See, e.g., 94 U.S. at 124 (referring to the "rights or privilges" with which "citizens" part when they enter society); *id.* at 125 ("the government regulates the conduct of its citizens one towards another, and the manner in which each shall use his own property, when such regulation becomes necessary for the public good"); *id.* at 129 ("the right of the citizen to pursue his lawful trade or calling"). As in *Allgeyer v. Louisiana*, 165 U.S. 578, 589-90 (1897), *McDonald v. Chicago*, 561 U.S. 742, 762 n.9 (2010), and the many religion-clause equal-citizenship cases cited earlier, the stream of historical evidence rele-

vant to the original meaning of the Privileges or Immunities Clause fed into the substantive due process river in *Munn*.

The natural-monopoly rationale raises some difficult boundary cases; Justices Field and Strong thought it would not justify the price controls in *Munn*. But while *Munn* might be a difficult case, this is not one. With substitute goods readily at hand, the natural-monopoly rationale never gets started. Unless changing Masterpiece's moral and religious views is *itself* deemed, as such, an improvement in public morals—a position obviously inconsistent with even the most minimal religious liberty—Colorado's stance here lacks police-power justification. "In order to allow equal citizenship for others, you must find another cakeshop" is plainly a message more consistent in this context with the original understanding of the Fourteenth Amendment than "In order to allow equal citizenship for others, you must find another profession."

CONCLUSION

The judgment below should be reversed.

Respectfully submitted,

DAVID R. UPHAM
Counsel of Record
UNIVERSITY OF DALLAS
1845 E. Northgate Drive
Irving, TX 75062-4736
(972) 721-5186
davidrupham@yahoo.com

CHRISTOPHER R. GREEN
UNIVERSITY OF MISSISSIPPI
SCHOOL OF LAW
481 Chucky Mullins Drive
University, MS 38677
(662) 915-6837
crgreen@olemiss.edu

Counsel for Amici Curiae